

July 16, 2007

Drew W. Hoyt

DIRECT DIAL: (617) 790-3323

*VIA EMAIL AND OVERNIGHT DELIVERY*

E-MAIL: dhoyt@bg-llp.com

Mr. Richard J. Chalpin, Regional Director  
Massachusetts Department of Environmental Protection  
Northeast Regional Office  
205B Lowell Street  
Wilmington, MA 01887

Re: Newburyport; RTN 3-26918; Crow Lane Landfill; FMF #39545; M.G.L. c. 21E, 310  
CMR 40.0000

Dear Mr. Chalpin:

This office represents New Ventures Associates, LLC ("New Ventures") and William Thibeault, in connection with the alleged 21E release described in the Notices of Responsibility and Notices of Response Action (collectively, the "Notice") issued by MassDEP on July 2, 2007.

Your Notice includes a determination that a release of hydrogen sulfide ("H<sub>2</sub>S") and heavy metals has occurred at or from the Crow Lane Landfill (the "Landfill"), which is owned and operated by New Ventures. Your Notice names New Ventures as a potentially responsible party ("PRP") for the alleged release, and asserts that deficient management of the landfill by New Ventures is a principal cause of the alleged release.

New Ventures rejects the notion that it bears principal responsibility for any release associated with the Landfill. New Ventures did not create the Landfill, but instead has been working diligently to close it. As you know, it was not New Ventures that spent decades shipping tons upon tons of unsorted municipal waste and sewer sludge to the site for burial in an unlined landfill. Rather, it was the City of Newburyport that did so. MassDEP should be on notice that, if response action costs are incurred by New Ventures under Chapter 21E, New Ventures intends to fully pursue reimbursement and/or contribution from the City of Newburyport and others who bear statutory liability for such costs.

With respect to your assertion that Mr. Thibeault personally is a PRP, such an allegation is completely baseless. If MassDEP has reason to believe Mr. Thibeault is a PRP, it is incumbent on MassDEP to state such reasons and provide any related documentation. To that end, enclosed herewith you will find a Public Records Request demanding copies of all

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records held by the Department that purport to establish the alleged personal liability of Mr. Thibeault.

In your Notice, you further state that MassDEP intends to take certain actions regarding the Landfill, which you characterize as Chapter 21E response actions. Such statements are contrary to the provisions of Chapter 21E, which limit MassDEP's authority to perform response actions, or to require others to perform them. Specifically, the statute provides that "[r]eleases and threats of release for which the department takes ... response actions, and the extent of such response actions, shall be determined by reference to the Massachusetts Contingency Plan." G.L. c. 21E, §4.

The response actions MassDEP proposes do not appear to have been "determined by reference to the Massachusetts Contingency Plan." It is entirely unclear where the proposed response actions would fall within the MCP process. Is MassDEP proposing Preliminary Response Actions pursuant to 310 CMR 40.0400? Comprehensive Response Actions pursuant to 310 CMR 40.0800? By all appearances, MassDEP is in fact proposing neither. Rather, it is evident that MassDEP is attempting to use Chapter 21E as a tool to perform – or pressure New Ventures to perform – certain actions related to landfill closure under 310 CMR 19.00. The course of action you propose is not appropriate, and any costs incurred by MassDEP pursuant to your Notice would not be recoverable under Chapter 21E.

In light of the above, New Ventures specifically prohibits MassDEP from entering the Landfill or any property owned by New Ventures for the purpose of conducting Chapter 21E response actions. To the extent that New Ventures has previously consented to MassDEP entering its property for oversight of solid waste actions pursuant to the Preliminary Injunction (the "PI") in this matter, or pursuant to other solid waste laws or regulations, such consent remains applicable is strictly limited to actions under the PI and applicable solid waste laws and regulations.

MassDEP's attempt to layer the Chapter 21E/MCP regulatory regime over the solid waste regulatory system is not only legally problematic, but it is also inappropriate from a practical point of view, as it would cause confusing, sometimes duplicative, and sometimes contradictory procedures and requirements. The result would be to make New Ventures' efforts to close the landfill more difficult and costly, and to increase the likelihood of delays and regulatory procedural errors by all parties involved, including MassDEP. More importantly, such procedural difficulties could prolong the capping and closing of the landfill, thereby increasing the likelihood of ongoing exposure to landfill gases.

Indeed, it seems the Department has already run afoul of one regulatory scheme while attempting to apply the other. In your Notice, you indicate that under Chapter 21E, New Ventures is required to hire a Licensed Site Professional ("LSP") and provide certain

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financial data and other information if New Ventures intends to carry out the actions described in the Notice. However, many of the proposed actions are ones that New Ventures is not only permitted, but required, to perform under prior MassDEP notices and the PI issued by Suffolk County Superior Court under the Commonwealth's solid waste laws. MassDEP does not have authority – absent a modification of the applicable court order – to prevent New Ventures from carrying out actions otherwise required and/or allowed by the PI. Your assertion that New Ventures must “apply for permission” under Chapter 21E if it wishes to continue closing the Landfill is simply incorrect, and New Ventures declines to submit the “application materials” you demand in your Notice. Furthermore, although the PI establishes and reserves many MassDEP remedies in the event New Ventures fails to comply with the PI, the PI does not include any provision allowing MassDEP to take over response actions under Chapter 21E.

I suspect the example above is but the first instance of the confusion that will occur if MassDEP attempts to apply two regulatory approaches to address a single landfill closure. These practical difficulties are immediately relevant. For instance, MassDEP has directed New Ventures to hire an LSP, but (putting aside for a moment the illegitimacy of that requirement), no LSP could reasonably be expected to take on the oversight of future actions without further clarification from the Department as to how the MCP process is expected to be applied to the Landfill, particularly with respect to actions consisting of more than assessment, i.e. modifications to the landfill gas and leachate management systems. Without such clarification, New Ventures would be hard pressed to find an LSP willing to put his or her stamp on such actions.

New Ventures will await further clarification from MassDEP with respect to the procedural matters discussed above. With respect to the substantive actions you propose be conducted at the Landfill, New Ventures responds as follows:

**1) Landfill Gas System**

Proposed Action: “Operate and maintain the landfill gas collection and treatment system twenty-four (24) hours per day seven (7) days per week (24/7) and expand and/or upgrade the system as needed to ensure maximum landfill gas capture efficiency and treatment”

Response: The PI fully governs the operation and maintenance of the landfill gas collection and treatment system. New Ventures will take all actions required by the PI. New Ventures operates the landfill gas collection and treatment system 24/7, and modifies the system in accordance with the PI.

Proposed Action: “a) Install, connect and operate landfill gas extraction wells EW-7, EW-10, and EW-13 as depicted on the design plan titled Landfill Gas Management Plan, revision

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date June 21, 2007, prepared by SITEC Environmental, Inc. ("SITEC") of Marshfield, Massachusetts, and received by the MassDEP on June 26, 2007;"

Response: The PI fully governs the installation, connection and operation of landfill gas extraction wells. New Ventures will take all actions required by the PI. The specific proposed actions are subject to ongoing communications between New Ventures and the Department pursuant to the PI, as part of the Department's review of the final Landfill closure plan submitted by New Ventures. The Department has not approved the above referenced plan as of this date to allow for the installation and operation of these wells.

Proposed Action: "b) Adjust and modify the landfill gas extraction and treatment system as necessary to achieve the maximum effective radius of influence for the landfill gas extraction wells;"

Response: The PI fully governs the installation, connection and operation of the landfill gas extraction and treatment system. New Ventures will take all actions required by the PI. Adjustment to the system occurs regularly in accordance with the PI, to achieve enhance performance based on methane and H<sub>2</sub>S data.

Proposed Action: "c) On the west/northwest side of the Landfill and elsewhere, as necessary, re-anchor and/or seal the Flexible Membrane Liner (FML) and landfill gas blanket and undertake additional measures as necessary to eliminate the release of landfill gas along the perimeter berm;"

Response: The PI fully governs the FML and landfill gas blanket. New Ventures will take all actions required by the PI. The re-anchoring of the FML and landfill gas blanket is in process.

Proposed Action: "d) Activate the landfill gas blanket within the Phase I and II Areas of the Landfill."

Response: The PI fully governs the installation, connection and operation of the landfill gas blanket, as it is part of the landfill gas extraction and treatment system. New Ventures will take all actions required by the PI. The landfill gas blanket's use at a lower cubic-feet-per-minute has not been approved by the Department.

## **2) Leachate Control**

Proposed Action: "a) Maintain and expand, if necessary, the leachate collection system including maintaining seals/covers on leachate collection tanks;"

Response: The PI fully governs the maintenance of the leachate collection system. New Ventures will take all actions required by the PI. All aspects of the leachate collection tanks, including any seals and/or covers, are regularly maintained.

Proposed Action: “b) Remove collected leachate from leachate accumulation tanks and/or collection ponds and wetlands and properly dispose of the collected materials;

Response: The PI fully governs the maintenance of the leachate tanks and collection ponds, and management of leachate in surface waters. New Ventures will take all actions required by the PI. Leachate tanks are pumped regularly, with the exception of Tank 4, which is subject to groundwater infiltration issues that have previously been addressed with the Department. New Ventures intends to bring in a vacuum truck to address the limited leachate that remains on the easterly side of the Landfill.

Proposed Action: “c) Maintain and/or expand capacity to manage leachate in the event of rain;”

Response: The PI fully governs the management of leachate. New Ventures will take all actions required by the PI. Leachate capacity is maintained such that collection ponds do not overflow.

Proposed Action: “d) Mitigate leachate breakouts by placement of cover material or by taking other appropriate measures;”

Response: The PI fully governs the management of leachate breakouts. New Ventures will take all actions required by the PI. Leachate breakouts are managed regularly, by measures including application of cover materials and elimination of breakout pathways.

Proposed Action: “e) Assess the impact of releases of leachate to the wetlands including, without limitation the collection and analysis of surface water, ground water, and sediment samples from impacted and potentially impacted surface waters and wetlands and of leachate samples from the leachate collection system and leachate breakouts.”

Response: The Department has already approved the scope of work for a Comprehensive Site Assessment. Implementation of the Comprehensive Site Assessment is underway, and is governed by the PI. New Ventures will take all actions required by the PI. Multiple rounds of sampling have been conducted, including sampling of groundwater, surface water, and sediment, with additional sampling planned. Considerable leachate sampling has also occurred.

### 3) Capping and Closure of Landfill

Proposed Action: “a) Place a temporary cap consisting of low permeability soil on the Phase IA Area of the landfill as described in MassDEP’s June 15, 2007, June 20, 2007, and June 21, 2007 correspondence to Attorney Richard A. Nylen of Lynch, DeSimone, and Nylen;”

Response: The MassDEP correspondence cited above was issued pursuant to the PI. The proposed action is fully governed by the PI and the correspondence issued thereunder. New Ventures will take all actions required by the PI with respect to this matter. However, as MassDEP has confirmed through its own inquiries, the clay or clay-equivalent that MassDEP wants to have placed on the Phase IA Area is not readily available in the marketplace. While continuing to pursue such material, New Ventures has in the meantime placed temporary cover over the subject area.

Proposed Action: “b) Ensure stability of the existing berm and manage storm water to prevent erosion, gas breakouts and leachate generation;”

Response: The PI fully governs the berm and the management of the Landfill with respect to erosion, landfill gas and leachate. New Ventures will take all actions required by the PI. New Ventures has taken steps, including for example the creation of drainage swales in the Fall of 2006, to manage storm water and ensure the stability of the berm.

Proposed Action: “c) Control leachate contamination in wetlands and remove eroded berm material from the base of berm and the wetland;”

Response: The PI fully governs the berm and the management of leachate. New Ventures will take all actions required by the PI. New Ventures has removed eroded berm material and will continue to do so as feasible, and will continue to act to prevent erosion of the berm.

Proposed Action: “d) Conduct a boring and testing program to collect the additional information, as described in the MassDEP’s March 7, 2007 Notice of Deficiency (NOTD) to you, that is needed to determine the as-built conditions of the existing berm and whether the revised design of the perimeter berm meets the appropriate factors of safety and design requirements in order to finalize the design of the perimeter berm and the final landfill cap;

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Response: The PI fully governs the berm. New Ventures will take all actions required by the PI. The specific requested action is subject to ongoing correspondence between the Department and New Ventures pursuant to the PI.

Proposed Action: “e) Revise the berm design plans as necessary and construct the mechanically stabilized landfill perimeter berm;”

Response: The PI fully governs the design and construction of the berm. New Ventures will take all actions required by the PI. In response to a technical deficiency notice from the Department, New Ventures submitted revised berm plans to the Department on May 30, 2007. New Ventures is currently waiting for the Department to complete its review and provide any further comments it might have regarding the revised plans.

Proposed Action: “f) Develop and revise the design plans, as necessary, for the final capping and closure of the landfill and install and complete the final landfill cap and gas collection system in the Phase I, IA, II, IIA and III areas.”

Response: The PI fully governs the development of design plans for the capping of the Landfill, and the implementation of final closure. New Ventures will take all actions required by the PI. New Ventures submitted an amended Corrective Action Design (“CAD”) document to MassDEP on June 25, 2007, and is waiting for MassDEP to complete its review and approve the CAD.

By taking the actions required by the PI, thereby closing the Landfill in accordance with the solid waste laws and regulations, New Ventures will have complied with the MCP as an “Adequately Regulated” site pursuant to 310 CMR 40.0114. Response Action Outcome statements are not required for adequately regulated sites, nor is any other documentation required to verify that substantial hazards have been eliminated or that a level of No Significant Risk has been achieved.

In short, New Ventures’ intention is to close the Landfill in accordance with the PI. By doing so, New Ventures will have satisfied all applicable laws and regulations. If MassDEP’s objective is to bring about a permanent and satisfactory closure of the Landfill, MassDEP should focus on resolving the matter within the framework of the PI and the underlying solid waste laws and regulations. Adding a new layer of regulatory complexity under Chapter 21E will do nothing to advance the closure of the Landfill.

Please be advised that Attorney Richard A. Nylen, Jr. remains the primary counsel for New Ventures with respect to the Landfill, while this office will address any issues specific to Chapter 21E. As you know, Attorney Nylen has been on a long-planned family vacation out

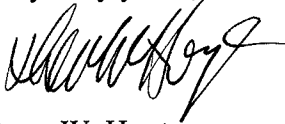
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of state from July 7 to July 14, the bulk of the time in which New Ventures was required to prepare its response to your Notice. Attorney Nylen requested the courtesy of a one-week extension of your Interim Deadline, so that he could assist in preparing a response. As MassDEP rejected Attorney Nylen's request, this office has been unable to fully consult with Attorney Nylen on the implementation of the PI and other related issues. Therefore, we reserve the right to amend, correct or supplement this letter after more fully consulting with Attorney Nylen. Further, should anything in this letter be inconsistent with past or future communications by Attorney Nylen with respect to actions or status under the PI or the solid waste laws and regulations, the communications of Attorney Nylen shall govern and be deemed accurate.

If you have any questions or further comments regarding the matters herein, please do not hesitate to contact me.

Very truly yours,



Drew W. Hoyt

DWH:dag

cc (by email and first class mail): New Ventures Associates, LLC  
William Thibeault  
Richard A. Nylen, Esq.  
Michael Quatromoni, SITEC Environmental, Inc.  
Michael W. Dingle, Esq., MassDEP  
Matthew Ireland, Esq., Office of Attorney General